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ALERT

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# NEW YORK APPEALS COURT IMPOSES INDIVIDUAL EMPLOYEE LIABILITY FOR INTERFERING WITH FMLA LEAVE AND RETALIATION

*By M. Christine Carty*

On March 17, 2016, the federal Court of Appeals in New York held for the first time as Second Circuit law that a human resources director and other managers can be liable for personally violating another employee's rights under the Family and Medical Leave Act ("FMLA"). The Court applied the familiar "economic reality test" used under the Fair Labor Standards Act ("FLSA") to determine if responsible employees can be held personally responsible in such cases. The decision appears to reflect a steady acceptance of individual liability in FMLA cases as the Court of Appeals followed the lead of three other federal appellate courts, and several district courts within its own circuit in reaching its decision.

The decision in *Graziadio v. Culinary Institute of America, Inc., et al.*, ___F.3d __, 2016 WL 1055742 (2d Cir. 2016), also stands as a warning to companies, and their officers and managers, of the potential consequences of failing to follow strictly the FMLA notice requirements and to clearly and specifically articulate those requirements in a timely way to employees who seek FMLA leaves.

In *Graziadio*, the Court instructed that, in FMLA cases in which an officer or manager is personally sued, a court must determine if that individual "controlled in whole or in part the plaintiff's rights under the FMLA" and thus assumed the role of an employer of the complaining employee. *Graziadio* prescribed the examination of "four non-exclusive and overlapping factors": whether the individual (1) has the power to hire and fire; (2) supervised and controlled the employee's work schedule and conditions of employment; (3) determined the rate and method of payment; and (4)maintained employment records." ___ F.3d ___, ___, 2016 WL 1055742, at *4

In *Graziadio*, the plaintiff employee took FMLA leave to care for her son when he was hospitalized with the sudden onset of Type 1 Diabetes. Her employer, the Culinary Institute of America ("CIA"), gave her the correct FMLA notice and the plaintiff provided a medical certification of her son's illness. So far, so good. The employee returned to work for a few days approximately two weeks after the child's hospitalization, but advised her manager that she would need intermittent FMLA leave. A week later, another of the employee's children broke his leg in an accident, and the employee advised her manager at the CIA that she would need additional FMLA leave to care for the second child. The employee told her manager that she would be able to return to work approximately two weeks later. On the scheduled return date, the employee advised her manager that she could return to work, but only on a three-day-a-week basis and, if that schedule was approved, she

would set a firm return date. She also asked if the CIA needed additional documentation to support her new leave requirements. At this point the employee's manager involved the CIA's human resources director.

Although the employee left many voicemail and email messages to find out when she could return to work, the CIA did not respond to her inquiry for 10 days. At that time the human resources director wrote to the employee and advised her vaguely that her FMLA paperwork failed to justify her absence and had to be updated to fix that deficiency. That letter set a deadline for submitting the updated documents that was incorrect under the FMLA. Following the letter from the human resources director, the employee and the human resources director embarked on a frustrating series of email and telephone communications in which the human resources director (i) never provided forms or a clear expression of what would satisfy the CIA as justification for the FMLA leaves, (ii) rejected a doctor's representation that the FMLA leave was necessary, (iii) cut off communication between the employee and her manager, and (iv) insisted on a personal meeting with the employee, who was still on leave, but avoided setting a date and time for the meeting in an exchange of emails over several days that the Court described as "excruciating." Eventually, the human resources director and the employee's manager terminated the plaintiff's employment for "job abandonment."

The Court found that, on these facts, a jury could find that both the human resources director and the employee's manager were personally liable, reversing the district court's order of summary judgment and sending the case back to the lower court for further proceedings. In support of its action the Court of Appeals held that there was sufficient evidence for a jury to find that the human resources director shared the power to hire and fire the employee with the employee's supervisor, and also controlled the employee's work schedule because the plaintiff was not allowed to return to work until the human resources director was satisfied with her FMLA documentation, and as she maintained the personnel records, as well. The Court's decision is replete with criticisms of the failure by the human resources director to respond promptly and specifically to the employee's numerous requests for a clear explanation of what the CIA needed to approve her FMLA leaves and to engage in a good faith dialogue with the employee.

As a result of the *Graziadio* decision, employers doing business in New York and Connecticut, the states covered by the Second Circuit, join those in the Third, Fifth and Eleventh Circuits that cannot avoid the possibility that their managers will be included as defendants in suits involving FMLA claims for their decisions and actions if they substantially meet the four criteria of the "economic reality test" described above. Certainly, managers face personal liability and reputational damage from such claims. Managers can avoid liability by strictly following the FMLA notice requirements and supplying proper forms, by providing accurate and timely information to the employees and by clearly stating what is needed to satisfy the request for leave. The tone of the *Graziadio* Court's decision also suggests strongly that an empathetic approach to employees' FMLA requests is expected.

As a practical matter, since most employers indemnify officers and managers for non-willful acts conducted in the course of their employment, managers who act in good faith are likely to be protected from the damages and legal costs arising from being named as individual defendants. The scope of allowable indemnification in any situation is dictated by state law and the formation documents of the employer. In addition, employers may have directors and officers liability insurance coverage to cover the costs of the indemnification and should consider giving notice to the insurance carrier of complaints that name managers as individual defendants. ◆

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